

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 15, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-2628

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RONALD BEATON AND BARBARA BEATON,

PLAINTIFFS-RESPONDENTS,

V.

ZANDER INSULATION, INC.,

DEFENDANT-APPELLANT,

HOLTZ & SONS CONSTRUCTION, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

VERGERONT, J. Zander Insulation, Inc. appeals a judgment in the amount of \$80,000 for negligent installation of a stucco system in the construction

of the home of Ronald and Barbara Beaton. Zander challenges the sufficiency of the evidence on the standard of care for a stucco subcontractor and the existence and amount of damages resulting from Zander's work. Zander also contends that the court erred in not submitting to the jury the issue of contributory negligence by the general contractor for damages to the walls and stucco of the house. We conclude that the trial court did not err in its rulings, that credible evidence supported the jury verdict, and that Zander is not entitled to a new trial in the interests of justice. We therefore affirm.

BACKGROUND

The Beatons entered into a contract with Holtz & Sons Construction for the construction of their home. Holtz in turn subcontracted to Zander the work of installing the stucco system.¹ After construction of the home was completed, the Beatons sued Holtz and Zander, alleging negligent performance of various tasks associated with the building of the home. Other parties were joined in the action but this appeal concerns only Zander and Holtz.

By the time of trial, the case had narrowed down to two issues of alleged negligence—the upside down installation by Holtz of a number of transom windows in the Beatons' house and the installation of the stucco system. After the Beatons moved into their home, they noticed that the windows were leaking and water was coming into the interior of the first floor of the home. Ultimately all the transom windows on the first floor of the plaintiffs' home were replaced. In the course of removing the windows, it was discovered that the OSB styrofoam

¹ This is referred to as a "stucco system" because it involved not only putting a stucco surface on the exterior of the house but also the installation of OSB (Oriented Strand Board), styrofoam and other materials beneath a thin stucco surface.

underneath the stucco surface was also wet. Based on an investigation the Beatons then had conducted, the Beatons contended at trial that the whole stucco system was negligently installed by Zander.

The jury determined that Holtz was one hundred percent liable for damages caused by the leaking windows and awarded \$14,700 for those damages, and also determined that Zander was one hundred percent liable for damages caused by negligent installation of the stucco system and awarded \$80,000 for those damages. After the verdict, Zander moved for “reconsideration” of its motion for a directed verdict because of the lack of evidence on standard of care and the lack of evidence that Zander’s alleged negligence caused damage; a new trial on the negligence and cause questions to allow the jury to address causal negligence by Holtz concerning the stucco and wall problems; a remittitur on damages; and a new trial in the interests of justice. The court denied the motions and entered judgment on the verdict.

DISCUSSION

Sufficiency of Evidence

First, Zander argues there was insufficient evidence from which a jury could find Zander was negligent because the Beatons did not present testimony on the standard of care for a stucco subcontractor. Therefore, Zander contends, the court erred in not granting its motion for a directed verdict and not granting its motion after verdict on this issue.

A motion challenging the sufficiency of the evidence may not be granted unless, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a

verdict in that party's favor. This standard applies both to the trial court and to the appellate court reviewing the trial court's ruling. Section 805.14(1), STATS.; *Weiss v. United Fire & Casualty Co.*, 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995). Because the trial court is in a better position to decide the weight and relevancy of the testimony, an appellate court must give substantial deference to the trial court's better ability to assess the evidence. *Id.*

The jury instructions on the standard of care provided:

A building contractor and any subcontractor have a duty to exercise ordinary care in the construction of a building. This duty requires such contractor or subcontractor to perform work with the same degree of care and skill and to provide such suitable materials as are used and provided by contractors or subcontractor of reasonable prudence, skill, and judgment in similar construction.

According to Zander, the testimony of William Herbert, an architect who testified that Zander did not comply with the manufacturer's specifications in installing the stucco system, was insufficient to establish that compliance with those specifications was the industry standard of care for stucco subcontractors. On the other hand, Zander contends, William Zander testified that he has been involved with other stucco projects in which there were deviations from manufacturers' specifications and this deviation is frequent for other subcontractors as well as for him.²

² Zander appears to argue that Herbert did not qualify as an expert on stucco system installation. Zander objected, before Herbert's testimony, to Herbert giving certain expert opinions. The trial court declined to rule in advance and advised Zander that it would consider objections to specific opinions offered during Herbert's testimony. Zander did not renew any objection to the admissibility of Herbert's opinions. Zander has therefore waived any right to object to the admissibility of Herbert's testimony. *See* § 901.03(a), STATS.

The proper inquiry here is not whether William Zander's testimony or other evidence supports Zander's position on the proper standard of care and Zander's compliance with that standard. The issue is whether, viewing the evidence most favorably to the Beatons, there is credible evidence from which a jury could reasonably determine that Zander violated its duty of care. We conclude that there is.

Herbert testified that, in fourteen years as a licensed architect, he had used stucco on approximately 220 buildings that he designed. On about half of that number he had used the "Dryvit" stucco system, the type used on the Beatons' house. He examined the stucco system on the Beatons' house installed by Zander. Herbert testified that it was installed with a total disregard for the specifications and was not working. Things were done that were not specified to be done and, in many cases, what was done was forbidden by the Dryvit Company. Zander had used a material around the windows that was incompatible with the window material unless a control joint was installed between the two materials, and that was not done. This caused cracking, which caused leaking. Also, according to the specifications, where a trim ran all around the house, above the windows, there was to be an expansion joint that would allow for movement, but Zander did not do that. The alternative that Zander employed did not allow for the necessary movement, and there would be cracks, there, too, as a result. The purpose of the manufacturer's specifications, Herbert testified, is to advise architects, engineers and contractors who are using the system how to do so. In Herbert's opinion, to a reasonable degree of architectural certainty, the only way to fix the stucco problems at the Beatons' home was to bring the system up to specifications, which would require removing the existing material and replacing it with new material.

In addition to Herbert's testimony, Bruce Nichols, a licensed architect, engineer and a home builder who hires subcontractors to build homes, testified that it is the general standard in the construction industry to expect subcontractors to follow the manufacturer's specifications for the materials being applied to the building. Robert Holtz, a general contractor, testified that when he hires subcontractors, he expects they will follow the manufacturer's specifications when putting in the materials.

We conclude there is sufficient credible evidence from which a jury could find that Zander's failure to follow the manufacturer's instructions violated the duty of care described in the jury instruction.

Second, Zander contends there was no evidence that the work performed by Zander caused any damage or caused damage necessitating repair and replacement of the entire stucco system. We disagree and conclude that a jury could reasonably determine from the credible evidence, viewed most favorably to the Beatons, that the damage that had occurred and would occur as a result of the improper installation of the stucco system was such that repair and replacement of all the stucco was necessary.

Ronald Beaton testified that when Holtz was taking out the upside-down windows to replace them, the contractors and he observed that the styrofoam and OSB behind the stucco surface was wet, even above the windows. Beaton, with Al Bachman, a general contractor, cut away more stucco at various spots on all four sides of the house to examine the OSB underneath, and discovered that the OSB was soaked, there was mold, and in places the OSB had disintegrated. The jury saw photographs and a video of cut away portions of the stucco and OSB. Herbert inspected those areas and he cut away portions in other areas as part of his

investigation. He also conducted moisture tests on a half a dozen areas that were not cut away and the results indicated water problems. In his view, it was not necessary to cut away more areas in order for him to reach his conclusions. He testified that because of the improper installation, the cracking that had already occurred at some joints would happen sooner or later on every joint if nothing was done. He had had experience with another building with this same type of improper stucco system installation and the same type of problem he observed at the Beatons' home, and the stucco in that building did not work; it fell apart and needed to be entirely removed. Herbert testified that unless the conditions causing the dampness were eliminated, the building rots from the inside. He explained in some detail why the entire system needed to be repaired and replaced, rather than repairing only certain locations.

William Zander acknowledged on cross-examination that the only way to find out if the wood underneath the stucco was rotting was to remove the stucco. Bachman testified that the only way to find all the wetness was to remove all the stucco and that he did not know if you could find all the rot if you took a piecemeal approach.

Zander points to Herbert's testimony that he actually examined only approximately five to ten percent of all the stucco and could not testify whether a particular area was damp or dry without examining it. We do not agree with the premise of Zander's argument that it was necessary for Herbert to examine some greater percentage of the stucco system, either by cutting away more of the surface or conducting more moisture tests, before the jury could reasonably rely on his opinion that there was or would be damage necessitating repair and replacement of the entire system. His observations and conclusions from the areas he did examine, his testimony that it was not necessary to cut away more in order to form

conclusions, and his explanation of the effects of the improper installation, together with William Zander's and Bachman's testimony, provide a sufficient evidentiary basis from which a reasonable jury could conclude that negligent installation of the stucco system caused the cracks and dampness, would cause more in the future, and that the entire stucco system needed to be repaired and replaced.

Zander's third challenge is the sufficiency of the evidence to support the verdict on the amount of damages. A jury verdict must be approved if there is any credible evidence that supports it. *Giese v. Montgomery Ward, Inc.* 111 Wis.2d 392, 408, 331 N.W.2d 585, 593 (1983).

Part of Zander's argument here appears to be a challenge to the instructions on damages. The jury instructions on the damages were:

In arriving at your answer to the damage question, you will be guided by the following rule. If the property can be restored to its condition before the damage, then the compensation to be awarded to the owner is the reasonable cost the making of such repairs to the property as will restore it to the condition in which it was prior to the damage. The proper measure under this rule is not the actual cost of some repairs as may have been made, but what it would reasonably cost, under all the circumstances to restore the property to its former condition ... WIS J I— CIVIL 1804 (1990).

Zander appears to argue that the Beatons' could not recover more than the contract price for the stucco system installation, which was \$32,000. We have searched the record of the jury instruction conference and do not see any indication that Zander objected to this damage instruction. There was discussion, in the context of the special verdict questions, as to whether the claims were based on contract or negligence. The resolution, with no objection by Zander, was that the claims were of negligence, not breach of contract. Failure to object to instructions at the

instruction conference deprives the court of appeals of power to directly consider the issue. Section 805.13(3), STATS.; *State v. Schumacher*, 144 Wis.2d 388, 409, 424 N.W.2d 672 (1988). We do not address this issue further.

Turning to the sufficiency of the evidence to support the \$80,000 award, we reject Zander's argument that the evidence on damages was merely speculative. The Beatons obtained two bids for the removal of the stucco, the replacement of the rotting wood under the stucco, and installation of the new stucco system. One was for \$81,300, and one was \$81,510. Herbert testified that both were reasonable.

Holtz's Negligence for Wall/Stucco Damage

Zander challenges the trial court's decision not to submit a question to the jury regarding causal negligence by Holtz for the wall/stucco problems. With respect to Holtz, the jury was asked if Holtz was negligent in failing to construct the Beaton home in a workmanlike manner; and if that negligence was a cause of damages relating to the leaking windows. The jury answered "yes" to both questions, and assigned one hundred percent of the negligence relating to the windows to Holtz. The jury determined that the Beatons were not negligent in the manner in which they attempted to remedy the leaking window situation and that Zander's negligence in applying the stucco was not a cause of the leaking windows.

Zander objected to the omitted verdict question at the instruction conference, properly preserving it for appeal. Zander argued that there was evidence that the leaking from the upside-down windows caused the dampness inside the walls of the house, in addition to causing water to flow into the interior living spaces of the house. The trial court disagreed. The court reasoned that the

testimony showed that there were two different problems: water came into the interior rooms of the house and water soaked into the walls of the house, causing damage to the “siding” of the house. The court concluded that there was no testimony that the upside-down windows caused the second problem.

The trial court revisited the issue the next day, before instructing the jury, after rereading its notes and having the court reporter read portions of the trial transcript. The court stated that it was satisfied that Herbert’s testimony and the testimony of other witnesses did not support a reasonable inference that the water leaking through the upside-down windows caused damage in the walls of the home. The court concluded that if the jury determined that the damage to the walls was caused by the windows being installed upside down, such a determination would not be supported by any reasonable inference in the record.³ The court reaffirmed this ruling in denying the motion after verdict on this ground.

We agree with Holtz’s analysis that the trial court’s decision is the equivalent of a directed verdict in favor of Holtz, against whom Zander had filed a cross-claim for contribution. We thus apply the same standard that we outlined in the “Sufficiency of Evidence” section although we are now looking at the evidence most favorably to Zander. We continue to bear in mind that we must give substantial deference to the trial court’s better ability to assess the evidence, and we must not overturn a trial court’s decision to dismiss for insufficient evidence unless the record reveals that the circuit court was clearly wrong. *Weiss*, 197 Wis.2d at 388-89, 541 N.W.2d at 761.

³ The trial court denied Zander’s request to permit William Zander to supplement his testimony on this point, but permitted Zander to make an offer of proof, which it did. Zander is not challenging this ruling on appeal.

The only evidence that Zander identifies that supports its position is the following testimony by Herbert:

With the windows being installed upside-down, the sill of the windows would be at the top of the window and direct water into the building rather than away from it. *See* Exhibit 24. In my opinion, this is what caused most of the leaks experienced.

Zander's contention is that "direct water into the building rather than away from it" could reasonably mean "direct water from the outside into the walls of the house" as well as "direct water into the living area of the house." Although we are to view evidence, including reasonable inferences from the evidence, most favorably to Zander, we agree with the trial court's approach of viewing these few lines in the context of all of Herbert's testimony. Herbert was quite definite in defining two separate problems: he described one problem as "water coming into the building and landing on the floor," or as "water running into the home," which he testified was caused by the upside-down windows. The other problem he defined as "dampness" or "rotting" under the stucco surface due to the manner of installation of the stucco system; this occurred in places near the upside-down windows and in other places not near those windows. The trial court was not clearly wrong in concluding that Herbert's testimony could not reasonably be interpreted to support a jury determination that the upside-down windows caused the dampness or rotting of the materials under the stucco surface.

In addition to Herbert's testimony, there was testimony that there was dampness in the walls in areas that were not near the upside-down installed windows, in areas above the windows, and near windows that were not installed upside down. We agree with the trial court that it is not reasonable to infer from this testimony that the upside-down windows caused this dampness.

New Trial

The trial court denied Zander' motion for a new trial in the interests of justice, concluding that the jury's findings were supported by the great weight and clear preponderance of the evidence and the damage award was neither excessive nor speculative. We do not reverse a trial court's denial of a motion for a new trial in the interest of justice in the absence of a clear showing of misuse of discretion or erroneous application of the law. *Suhaysik v. Milwaukee Cheese Co.*, 132 Wis.2d 289, 303, 392 N.W.2d 98, 104 (Ct. App. 1986). We see neither here, and conclude the trial court properly exercised its discretion in denying the motion. Because we have resolved each issue against Zander, we see no basis for the exercise of our discretionary powers of reversal under § 752.35, STATS.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

